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**SUPREME COURT OF THE STATE OF WASHINGTON**

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ELCON CONSTRUCTION, INC.,

Petitioner,

v.

EASTERN WASHINGTON UNIVERSITY,

Respondent.

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**EASTERN WASHINGTON UNIVERSITY'S RESPONSE TO  
AMICUS CURIAE BRIEF OF INLAND NORTHWEST AGC, ET  
AL.**

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## **I. INTRODUCTION**

In their statement of the case, Amici, like Elcon, focus on the Golder Report, contending that this report was "intentionally concealed," or "withheld" from Elcon. The contentions are not supported by the record, overlook the striking difference between the Well 1 and 2 refurbishing project Elcon bid and the subject matter of the Golder Report, disregard the clear language of the contract that required Elcon to investigate site and subsurface conditions and ignore the undisputed fact that Elcon and its subcontractor failed to conduct an investigation of subsurface conditions. In addition, Amici's argument ignores the undisputed facts that no pre-project documents, including the Golder Report, indicated the presence of a layer of sand would be encountered 440 below ground at Well Site 1, and that Elcon and its subcontractor knew and understood when they bid the project that they could be required to drill as deep as 900 feet. Amici, like Elcon, would have the Court ignore the undisputed fact that the work on Well 1 was terminated when the well was drilled to the 831 foot level, well within the up to 900 foot contract depth as understood by Elcon and Intermountain. Amici and Elcon ignore the undisputed fact that work was stopped because Well 1 had been so badly damaged by Elcon/Intermountain's inability to drill through the sand layer that further attempts to complete the well would

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have been futile and expensive. Finally, Amici, like Elcon overlook the critical undisputed fact that Elcon has already been compensated under the contract, having sought \$2.8 million in contract arbitration and recovered over \$1.8 million, making the same arguments and claiming the same damages in arbitration that it now seeks to recover as damages for fraud.

## **II. COUNTER STATEMENT OF THE CASE**

### **A. The Golder Report Compiled Publicly Available Information And Was Not Done For The Project In Question.**

Since Elcon's case, and the position of the Amici, are based on an alleged need for the Golder Report, it is important to accurately state the facts in the record about the Golder Report.

The Golder Report was completed in 2000. CP 316. At that time, Eastern's permit application to increase the capacities of Wells 1 and 2 had been pending for 12 years. CP 1096-1097. The Golder Report was part of a study to determine the best way to obtain more water, above the existing 900 gpm water right, to serve the University's future growth. CP 1096. The report did not address refurbishment of Wells 1 and 2, which were used to pump the water authorized by Eastern's existing water right. CP 1096-1097.

The geologic conditions described in the Golder Report were open knowledge, not new geological information hidden by Eastern. When

wells are drilled, the driller usually submits a well log to the Department of Ecology. To assist others drilling in the area, the Department of Ecology provides the well logs to the public on the Department's internet website. CP 320-321, 341, 1097. The well logs for the Grand Ronde aquifer provide data for many decades of drilling. The publicly available logs reflect a wide range of successful drilling depths in the area, as well as the geological materials encountered during the drilling. All of the drilling log data compiled in the Golder Report was available to Elcon and Intermountain on the Department of Ecology's website. CP 1212. Elcon/Intermountain concede that they were aware of the website, and admit that they looked at some of the well logs, but did not see any that they considered relevant. *Id.*

**B. The Bid Documents And Contract Allocated The Duty To Investigate Site Conditions And The Risk Of Subsurface Conditions To Elcon But Elcon Did No Investigation Of Subsurface Conditions.**

Before bidding, Elcon agreed to examine the site, and investigate site conditions, including subsurface conditions. CP 1114 §1.03, 1095-1096. Elcon agreed that it could not rely on statements made pertaining to the physical condition of the site. *Id.* When it submitted its bid and when it entered into the contract, Elcon certified that it had investigated the site, including subsurface conditions and satisfied itself that it could drill the

wells for the prices quoted. CP 313, 1113, 1123-1124. However, after the project was terminated, Elcon admitted that it had done "no real investigation" of the subsurface conditions. CP 1212.

**C. 750 Feet Was Not The Maximum Well Depth Contractually Specified.**

The purpose of the Well refurbishment project was to increase the size of Wells 1 and 2, which were both approximately 550 feet deep, so that each well would be capable of producing the 900 gpm the University was allowed to pump in 2003. CP 1093-1094. That way, if one well was not working, the University's water supply could be maintained. CP 1094. Based on advice from its consultants, Eastern expected to achieve the 900 gpm targets by drilling new extraction points to 750 feet. CP 1094. Since there was no guarantee that sufficient water would be found at 750 feet, the contract and bid documents provided that the drilling contractor could be instructed to drill deeper. CP 357. Elcon understood that they could be required to drill as deep as 900 feet. Their equipment was capable of drilling 1000 feet. CP 865, 1196. The project was terminated at 831 feet. CP 1449.

**D. Elcon Has Fully Recovered Under the Contract, Including Compensation For Extra Costs Related To Drilling In Sand.**

Elcon's bid was \$1,516,635.00 for the whole project. Including payments by Eastern and the arbitrator's award, Elcon has recovered a

total of \$1,837,496.00 under the contract claims. CP 1099-1100.

Elcon encountered sand at 440 feet and was still not through the sand at 626 feet. CP 71, 672. Elcon submitted a change order, which was allowed, based on unforeseen conditions, to change the work and increase the contract price because of encountering the sand. CP 1448-1470. During a progress meeting on November 4, 2003, after Elcon had drilled to 626 feet, the change order, among other things was discussed. In this meeting the question was asked by Elcon: "Was there a hydrogeology report for this project and if there is, we want a copy." Eastern responded: "No, a hydrogeology report was not prepared for this project." CP 672-674. The work was stopped at 831 feet. CP 1449. The well was so damaged by Elcon's attempts to withdraw its broken drill from the shaft that it could not be used and the well had to be decommissioned. CP 162-164, 1099-1100.

### III. ARGUMENT

#### A. **Under *Eastwood, Alejandre, Berschauer* And The Independent Duty Doctrine, Elcon's Claims Are Governed By Contract And Its Tort Claims Are Barred.**

When construction contracts are involved, the parties have a right to rely on the allocation of risks and responsibilities set forth in their contracts, including those that allocate a duty to investigate and thereby modify the duty to disclose and/or the right to rely. Justice Chambers

summarized the principle in his concurring opinion in *Eastwood v. Horse Harbor Foundation, Inc.*, 170 Wn.2d 380, 416, 241 P.3d 1256 (2010):

“In sum, a careful examination of our case law reveals that this court has applied the independent duty rule to limit tort remedies in the context of product liability where the damage is to the product sold and in the contexts of construction on real property and real property sales. We have done so in each case based upon policy considerations unique to those industries. We have never applied the doctrine as a rule of general application outside these limited circumstances.

To summarize, duties imposed by law and duties assumed by agreement often apply to the same events. It is the province of this court to decide the duties imposed by law, and once having recognized a tort duty, it is the province of this court to decide that a duty no longer applies to certain circumstances or events.”

The strong policy favoring allowing parties to construction contracts to modify legal duties and responsibilities by allocating risks and duties in their contracts was recognized in *Berschauer/Phillips Const. Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994), where the court held at page 828:

We hold that when parties have contracted to protect against potential economic liability, as is the case in the construction industry, contract principles override the tort principles in §552 and, thus, purely economic damages are not recoverable. . .

There is a beneficial effect to society when contractual agreements are enforced and expectancy interests are not frustrated. In cases involving construction disputes, the contracts entered into among the various parties shall

govern their economic expectations. The preservation of the contract represents the most efficient and fair manner in which to limit liability and govern economic expectations in the construction business.

In the instant case, the contract not only allocated the duty to inspect and investigate the site and subsurface conditions and attendant risks to Elcon, it also prescribed remedies in the event a diligent inspection and investigation failed to reveal unforeseen conditions. Elcon availed itself of these contract provisions and negotiated a change order during the job. Elcon was paid for its work. Then, after the job was stopped, again under the contract terms, Elcon claimed the same damages as it now claims for "fraud" and was awarded \$891,000.00 in addition to the \$947,000.00 Eastern had already paid. Here, not satisfied with the arbitrator's award, Elcon mounts nothing more than a collateral attack on the arbitrator's award, heading "back to the well one more time," alleging fraud. Unless the Independent Duty Rule is used analytically here to enforce the contract and preclude Elcon's tort claims, construction contracting will, much to society's detriment, be forever "drowned in a sea of tort." *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986) and *Alejandro v. Bull*, 159 Wn.2d 674, 694-695, 153 P.3d 864 (2007) (Justice Chambers, concurring).

**B. The Contract Allocated The Duty To Inspect and Investigate And Elcon Had No Right To Rely On Eastern To Provide The Golder Report.**

In *Alejandre v. Bull*, it was recognized that when a contract allocates a duty to inspect the condition of real property being purchased to the purchaser, the purchaser who did not undertake a diligent inspection of the property may not maintain an action for negligent misrepresentation based on the seller's failure to disclose a defect in the property, known to the seller, that would have been discovered by the purchaser if a reasonably diligent inspection had been done:

While negligent misrepresentation *may* sound in tort, Restatement (Second) of Torts, §552 (1977), in this case, the claim falls under the contract these parties signed. The remedies available to the parties are controlled by the contract between the parties.

*Alejandre*, 159 Wn.2d at 697-698 (Justice Chambers, concurring).

Recognizing that an action for fraudulent concealment would not ordinarily be precluded by the Independent Duty Doctrine (then known as the Economic Loss Rule) the court nevertheless upheld dismissal of the fraud claim, noting that "The right to rely element of fraud is intrinsically linked to the duty of the one to whom the representations are made to exercise diligence with regard to those representations." *Id.* at 690. The court concluded the fraud claim was properly dismissed since the Alejandres had a duty to diligently inspect the property before purchasing,

they could not produce evidence that they had a right to rely on a representation that there was no defect in the property.

Here, Elcon's duty to inspect and assumption of the risk of not inspecting was even more pronounced than the Alejandre's, with contract provisions specifically allocating the duty and attendant risk to Elcon and warning that Elcon was not entitled to rely on "statements" about the physical condition of the work site. It is necessary in construction contracts that involve drilling and/or excavation to allocate the risks of subsurface conditions. Contractors must adequately investigate, consider the risks of subsurface obstructions to drilling and set their price accordingly. Here, no party knew whether Elcon would encounter sand in drilling Well 1, but the possibility of encountering sand beneath the surface in the Cheney area would have been evident from a diligent review of well logs from other wells that were available to the public. Other contractors who had drilled in the Cheney area could have been consulted, but they were not. CP 1194, 1212. When asked point blank what investigation was done in this case, Elcon's representative admitted "We made a couple of phone calls, but no, no real investigation."<sup>1</sup>

Elcon's view of investigation was to ask Eastern for all of the

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<sup>1</sup> This same representative also testified that he "looked at some well logs that we thought might pertain to that area, but there were none right on, right on that campus." CP 1212.

information they had about the subsurface conditions. CP 1211. In response, Eastern referred Elcon to its consulting engineer who in turn provided Elcon with the drilling log for Well 2, the only information available about the subsurface conditions at either drilling site. There was no drilling log for site 1 (the well was drilled in approximately 1890, CP 673) and the much ballyhooed Golder Report contained no information about subsurface conditions at site 1.

Amici rely heavily on *Scroggin v. Worthy*, 51 Wn.2d 119, 316 P.2d 480 (1957), for the proposition that a party to a business transaction has a right to rely on representations of material fact made by the other party. *Scroggin* is not applicable here. In *Scroggin*, it was undisputed that the purchaser of commercial real estate visited the property and was told by an occupant of the property that the property had been condemned for health reasons. The buyer then contacted both seller's real estate agent and the seller who told her that the property had not been condemned. In fact, the county had condemned the property because the sewer system was discharging raw sewage onto the surface of the property. It was undisputed that both the seller and the realtor knew the property had been condemned when they lied to the purchaser stating that it had not. *Scroggin* involved intentional misrepresentation of a known fact. Here, Eastern did not have knowledge that Elcon would encounter a layer of

sand 440 feet underground at well site 1. The only relevant information Eastern had was the drilling log for Well 2, which was located four to five blocks from Well 1 and showed no sand layer and that log was provided to Elcon.

Amici's suggestion that as a public entity Eastern assumes a greater duty to disclose not applicable to private parties is neither legally supported nor reasonable. RCW 4.92.090 makes it clear that the tort liability of the state and its agencies is co-extensive with that of private persons or corporations. Eastern had no knowledge of the subsurface conditions at Well Site 1, and like any other party, Eastern had no duty to disclose information that was generally known and/or equally available to everyone. In addition, the contract here clearly spelled out Elcon's duty to investigate subsurface conditions, allocated the risk of subsurface conditions to Elcon and made provision for remedies in the event unforeseen conditions were encountered. Elcon, like the Alejandres, failed to do a diligent investigation before entering the contract. Moreover, Elcon, upon executing the contract, certified that it had undertaken an investigation of the site, including the subsurface conditions, and that it was satisfied that it could do the job. Here, as in *Alejandre*, the contract provisions control Elcon's tort claims of misrepresentation. Any recognizable fraud claim must fail due to lack of

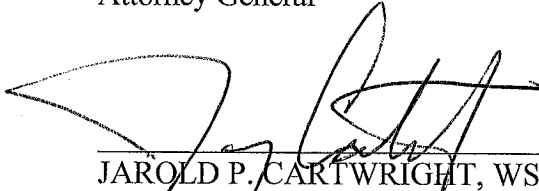
evidence sufficient support the elements of misrepresentation and justifiable reliance. "No real investigation" is the same as no investigation and does not represent the diligence required to show a right to rely. *Alejandre*, 159 Wn.2d at 690.

#### IV. CONCLUSION

For the reasons set forth, Eastern Washington University requests that Elcon be held to its contract duties and that summary judgment in favor of Eastern be affirmed.

RESPECTFULLY SUBMITTED this 13 day of October, 2011.

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### PROOF OF SERVICE

I certify that I served a copy of Eastern Washington University's Response to Amicus Curiae Brief of Inland Northwest AGC, et al. on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 13 day of October, 2011, at Spokane, WA.

  
\_\_\_\_\_  
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